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Pleading--Alternative Methods of Changing Theory of Action on Appeal

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ment to be recordable.[23] But this substantial compliance test does not shed light on West Virginia's view, because these cases involved claims of some defect in the acknowledgment itself, not the questioning of an acknowledgment because the instrument acknowledged was altered. Such a case, then, would be one of first impression before the West Virginia court.

The principal case shows that an immaterial alteration of a deed is one leaving the legal effect unchanged, but the case seems contrary to the weight of authority in its implications that a re-execution or redelivery was needed subsequent to the immaterial change to bind the parties to the deed. The principal case also raises a problem that might be troublesome in the future concerning the effect of this recorded instrument as constructive notice to third parties. The majority view would probably consider any reacknowledgment unnecessary, that the original execution and delivery are valid and binding on the parties to the deed, and that the original acknowledgment is similarly binding on third parties. The court in the principal case points out the second oral acknowledgment by the grantor. However, as was noted, the finding that there was no material alteration of the deed made the discussion of this second oral acknowledgment pointless. In finding that the deed was effective with the original signature, the court implied that the original acknowledgment was also valid. The deed, then, was completely valid and effective in its altered form.

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Pleading—Alternative Methods of Changing Theory of Action on Appeal

P, buyer of a mobile home, brought an action to rescind a purchase contract because of defects in the floor. D_1 (dealer) in turn initiated a third party complaint against D_2 (manufacturer). The Court of Common Pleas rendered judgments in favor of *P* against D_1 and in favor of D_1 against the third party D_2. The circuit court reversed both judgments and entered judgments in favor of D_1

[23] *In re* Atlantic Smokeless Coal Co., 103 F. Supp. 348 (S.D. W. Va. 1952); Blake v. Hollandsworth, 71 W. Va. 387, 76 S.E. 814 (1912).

against *P* and in favor of D_3 against D_1. *Held*, affirmed. Since *P* kept the property for a prolonged period of time, treating it as acceptable and making payments on it, he waived his right to rescind. If *P* had a cause of action, it was for damages for breach of warranty. *Shreve v. Casto Trailer Sales, Inc. v. Monarch Indus., Inc.*, 149 S.E.2d 238 (W.Va. 1966).

In the principal case the Supreme Court of Appeals did not decide whether *P* had a cause of action. There is, however, considerable federal case law to support the proposition that a plaintiff with a good cause of action may be allowed recovery even though he brings his action on the wrong theory. Rule 54(c) of the Federal Rules of Civil Procedure states that a party is to be granted any relief to which he is entitled even though he has not demanded it.[1] In *Kowalewski v. Pennsylvania R.R.*,[2] Judge Rodney stated: "The legal rights of the plaintiff are to be determined by the law and the facts established in the case, and not by some language in the claim."[3] And in *Nester v. Western Union Tel. Co.*, the court held as follows:

> Under the liberal rules of the reformed procedure, a plaintiff is entitled to recover, not on the basis of his allegations of damages or of his theory of damages, but on the basis of the facts as to damages shown in the record. This liberality is carried over into the new rules [Federal Rules of Civil Procedure]. . . . [T]he plaintiff should be denied relief only when, under the facts proved, he is entitled to none.

Had the court in the principal case made a specific finding that *P* had a right to recover for breach of warranty, the federal lead in the preceding cases could have been followed. However, it would seem that the duty on the court to allow such a recovery lies not as heavy as the duty on the plaintiff to bring to the court's attention the facts and the law supporting such a recovery. This the plaintiff can do by a motion to amend, when necessary, and, as will be shown later, this amendment may change the theory of the action.

The record in the principal case does not reveal that *P* requested leave to amend his complaint at any stage in the proceedings.

[1] Gins v. Mauser Plumbing Supply Co., 148 F.2d 974, (2d Cir. 1945).
[2] 141 F.Supp. 565 (D. Del. 1956).
[3] *Id.* at 569.
[4] 25 F.Supp 478, 481 (S.D. Cal. 1938).

This is significant in view of the fact that judgment was rendered against him because his action in contract for rescission did not lie. The West Virginia Supreme Court of Appeals stated in the decision that an action for breach of warranty might be proper. Yet this is of little consolation to *P*. His only apparent recourse at this point would be to institute another action. As a result, a plaintiff might be denied recovery in a second action even though he might have recovered a judgment in the first action if he had chosen the correct theory, *i.e.*, he may be barred by res judicata or even by the statute of limitations.

Had *P* sought to amend the complaint in this case, the question arises concerning how late this should have been allowed, and particularly, at what stage might he have been granted leave to change his "cause of action." One may argue that *P* had the opportunity to choose the theory on which he intended to recover, and that he must win or fail on that theory.[5] However, the federal courts, under the Federal Rules of Civil Procedure which are to be liberally construed, have for the most part rejected this idea.[6] Numerous federal cases, which will be discussed later, give strength to the idea that a plaintiff may be allowed to change his "cause of action" at any time, before judgment or afterward.[7]

If the appellate court decides that the plaintiff should be allowed to amend and make such a change, there are various ways by which this may be accomplished. First, the appellate court may allow such an amendment on its own.[8] This would eliminate the necessity of remanding to the lower court. It would be in line with the spirit of the federal rules, being the most direct means to reaching a just result.

Secondly, although no case directly in point has been found, it would seem that the appellate court may also remand the case to the trial court with directions that the trial court hear a motion to change the theory of action by amendment. Certainly the higher court can remand directing the trial court to hear a motion to amend. In *Moviecolor Ltd. v. Eastman-Kodak Co.*,[9] the court

[5] This concept was known as the "theory of the pleadings" doctrine.

[6] "Federal Rules of Civil Procedure have done away with the narrow 'theory of pleadings' doctrine." Nord v. McIlroy, 296 F.2d 12, 14 (9th Cir. 1961).

[7] These cases are in line with a liberal construction of Rule 15(b) of the West Virginia Rules of Civil Procedure, which rules are patterned after and in most instances identical with the Federal Rules of Civil Procedure.

[8] 3 MOORE, FEDERAL PRACTICE § 15.13(2), at 985, 989 (2d ed. 1964).

[9] 228 F.2d 80 (2d Cir. 1961).

said: "Plaintiff urges that . . . we should state that affirmance is without prejudice to the District Court's entertaining an application to amend. We have the power to do that even at this late stage."[10] And in a Maryland case, before the mandate was issued, the plaintiff petitioned the court of appeals to modify its opinion by striking out the affirmance of the judgment for costs and in lieu thereof to remand the case if it should appear to the court that the "purposes of justice will be advanced by permitting further proceedings."[11] This was done. Upon such a remand, the discretion of the trial court governs the allowance or disallowance of an amendment, and one may argue that the trial court, having been granted the right to hear a motion to amend, is free to exercise a wide discretion in this matter, as long as there have been no specific restrictions from the higher court.[12]

A third alternative open to the appellate court would be to remand to the lower court with leave to the plaintiff to amend his theory of action.[13] This removes the question of amending from the discretion of the trial court.

The importance of remanding in cases such as these lies in the fact that the plaintiff is still in court, and thus avoids the defenses available in a new action. But a caveat should be sounded in cases where the court merely remands, and says nothing in regard to amendments. The plaintiff may be allowed to amend and present new issues with the lower court's consent.[14] However, there is substantial case law to the contrary, stating in effect that the mandate of the appellate court must authorize the lower court to hear a motion to amend before it can do so.[15]

At any rate, the previously mentioned cases indicate a trend in the federal courts to allow amendments freely, even at the appellate stage, and even though this entails a change in the "cause of action." However, at this stage an amendment may not raise issues which have not been raised in the proceedings at any prior

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[10] *Id.* at 88.

[11] Fletcher v. Havre De Grace Fireworks Co., 229 Md. 196, 203, 183 A.2d 386, 388 (1962).

[12] Canister Co. v. Leahy, 191 F.2d 255, 257 (3d. Cir. 1951); Sheridan-Wyoming Coal Co. v. Krug, 172 F.2d 282, 284 (D.C. Cir. 1949).

[13] Bryan v. Austin, 354 U.S. 933 (1957).

[14] Jones v. St. Paul Fire & Marine Ins. Co., 108 F.2d 123, 125 (5th Cir. 1939).

[15] Ginsburg v. Stern, 242 F.2d 379, 381 (3d Cir. 1957).

stage. "Where, however, the appellate court finds that the case was impliedly tried below on a theory not expressed in the pleadings, it may allow an amendment on appeal to incorporate such theory."[16]

The principal case offers no guidelines with respect to the amendment issue or recovery on a different theory. The question was not before the court. When the situation does arise, the court may choose to reject a liberal construction of the West Virginia Rules as applied to amendments. However, it seems it should make every effort to decide a case on the merits.[17] And if this be the goal, one may assume that the court will follow the federal lead in construing Rule 15(b) in such a manner as to "do substantial justice."[18]

Fred L. Fox, II

Public Utilities—What Constitutes a Public Utility in West Virginia

D, according to privately negotiated contracts, was to deliver gas from its wells and neighboring wells in Barbour County via its own pipeline to *X* and *Y*, two large Harrison County industrial firms, already being served by *C* Gas Company, a public utility. Acting upon a complaint filed by *C*, the Public Service Commission of West Virginia ordered *D* to discontinue operations until it applied for and received a certificate of public convenience and necessity, a prerequisite to a public utility service.[1] Upon petition for judicial review, *held*, reversed. *D*, serving only *X* and *Y* in accordance with the privately negotiated contracts and with no present intention to serve others, was not holding itself out to serve the public and, therefore, was not a public utility. *Wilhite v. Public Serv. Comm'n*, 149 S.E.2d 273 (W. Va. 1966).

The principal case presents the board inquiry as to what is a public utility, and particularly, whether a company transporting gas via its own pipeline to private customers falls within the defini-

[16] 3 MOORE, FEDERAL PRACTICE § 15.11, at 967 (2d ed. 1964).
[17] United States Fid. and Guar. Co. v. Eides, 144 S.E.2d 703, 710 (W. Va. 1965).
[18] W. VA. R. CIV. P. 1.
[1] W. VA. CODE ch. 24, art. 2, § 11 (Michie 1966).